

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
BIZTEL, INC. (C/O AT&T CORP.))	File Nos. 0004587562, 0004589952,
)	0004591027, 0004591084, and 0004591086
For Renewal of 39 GHz Common Carrier)	
Microwave Licenses for Stations WMT620,)	
WMT635, WPJA911, WPJC937, and WPJC939)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 18, 2012

Released: December 18, 2012

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we find that Biztel, Inc. (“Biztel”)¹ has failed to demonstrate substantial service for its 39 GHz Common Carrier Microwave Stations WMT620, WMT635, WPJA911, WPJC937, and WPJC939. Based on this determination, these licenses automatically terminated, by operation of Commission rule, as of February 1, 2011.

II. BACKGROUND

2. Licenses in the 38.6-40.0 GHz band (“39 GHz band”) are subject to Part 101 of the Commission’s Rules, which generally governs terrestrial microwave operations.² Originally, channels in the 39 GHz service were licensed on a licensee-defined Rectangular Service Area (“RSA”) basis, but the Commission later revised its rules to provide for Economic Area (“EA”) licenses,³ and auctioned 39 GHz overlay licenses on an EA basis in 2000.⁴ Licenses in the 39 GHz band are licensed for ten-year terms and licensees must demonstrate “substantial service” as part of their applications for license renewal.⁵ In establishing this substantial service standard, the Commission intended to “ensur[e] that service is being provided to the public,”⁶ but wanted to provide licensees “a significant degree of flexibility in meeting

¹ Biztel is a subsidiary of AT&T Corp.

² 47 C.F.R. Part 101.

³ Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600 (1997) (*39 GHz R&O*).

⁴ See 39 GHz Band Auction Closes, *Public Notice*, 15 FCC Rcd 13648 (WTB 2000).

⁵ See 47 C.F.R. §§ 101.17, 101.67. See also, *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 49.

⁶ *39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 46.

their performance requirement.”⁷ In an effort to give licensees this flexibility, the Commission rejected defining specific build-out benchmarks as “unduly restrictive and burdensome.”⁸ The Commission did provide, however, a “safe harbor” example of a substantial service showing as “four links per million population within a service area.”⁹ Notably, the Commission specifically declined to exempt incumbent 39 GHz band licensees from the substantial service renewal showing.¹⁰

3. Biztel is the licensee of 39 GHz Common Carrier Microwave Stations WMT620, WMT635, WPJA911, WPJC937, and WPJC939 licensed on an RSA basis. Biztel was required to renew these licenses and demonstrate substantial service for these stations by February 1, 2011, the expiration date of those licenses.¹¹ On January 25, 2011, Biztel filed timely renewal applications for the subject stations.¹² In accordance with Section 101.17 of the Commission’s Rules, Biztel attached its substantial service showings to the subject renewal applications.¹³ Biztel states that it “employs its 39 GHz common carrier fixed point-to-point microwave facilities as an alternative to other technologies for providing “last-mile” access to the AT&T network,”¹⁴ and also uses its facilities “to provide redundant capacity to its wireline facilities and to provide backhaul capacity for AT&T’s wireless services.”¹⁵ Biztel explains

⁷ *Id.* at 18623 ¶ 42.

⁸ *Id.* at 18623-18624 ¶ 43.

⁹ *Id.* at 18624-18625 ¶ 46. We note that, although the Commission did not use the specific term of “safe harbor” in the 39 GHz band context, we believe the Commission intended for this example to serve, in fact, as a “safe harbor.” This determination is consistent with similar examples the Commission has provided in other services. *See* Amendments to Parts 1, 2, 87, and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16934, 16951-16952 ¶ 38 (2000); Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1537-1538 ¶ 70 (2000); Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853, 19870 ¶ 34 (1998); Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5 – 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12660-12661 ¶ 270 (1997); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10843-10844 ¶ 113 (1997).

¹⁰ *39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 46.

¹¹ *See* 47 C.F.R. § 101.17.

¹² File Nos. 0004587562, 0004589952, 0004591027, 0004591084, and 0004591086 (filed Jan. 25, 2011) (Renewal Applications). With each Renewal Application, Biztel submitted an Exhibit 1 entitled Substantial Service Showing. While the specific information relating to each license differed, Biztel made the same arguments for each license. Originally, Biztel submitted the Substantial Service Showings with a request for confidential treatment. *See* Request for Confidential Treatment (filed Jan. 25, 2011). On October 17, 2011, Biztel amended its Renewal Applications to provide public versions of its substantial service showings with certain information redacted. *See* Exhibit 2 – Public Version – Substantial Service Showing (filed Oct. 17, 2011) (collectively, “Substantial Service Showings”). All citations to the Substantial Service Showings in this *Memorandum Opinion and Order* are to the public versions filed on October 17, 2011.

¹³ *See* 47 C.F.R. § 101.17.

¹⁴ *See* Substantial Service Showings at 1.

¹⁵ *See* Substantial Service Showings at 2.

that while it has constructed and operated links for all the licenses in question during the license term, the links that are currently deployed for these licenses are not being used to provide service at this time, and many of the links are presently disconnected.¹⁶ Nonetheless, Biztel argues that it has earned a renewal expectancy for the subject licenses by providing “substantial service” over the course of the license term.”¹⁷

III. DISCUSSION

4. We find that Biztel has not demonstrated substantial service for the subject 39 GHz licenses. Biztel has not sought a waiver or extension of time to demonstrate substantial service for these licenses. Without such extension or waiver, Biztel’s licenses have automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules, as of February 1, 2011.¹⁸ We discuss these findings in detail below.

5. To demonstrate substantial service, Biztel must show that it meets the Commission’s definition of substantial service or that it meets one of the safe harbors applicable to 39 GHz licenses. Biztel must demonstrate substantial service “for each channel for which they hold a license . . .”¹⁹ Biztel has the option of showing that it has met an applicable safe harbor showing. For 39 GHz licenses, a safe harbor of four links per million within a service area applies.²⁰

6. The Commission’s 39 GHz rules clearly define substantial service as service as of the time of license renewal. Section 101.17(a) of the Commission’s Rules states, “All 38.6-40.0 GHz band licensees must demonstrate substantial service at the time of license renewal.”²¹ The same rule requires licensees to describe their “current service” in terms of geographic coverage and population served.²² Biztel, however, does not attempt to show that it is currently providing service or has met the safe harbor

¹⁶ See Substantial Service Showings at 2. Specifically, for Station WMT620, 11 links were constructed and/or operated during the license period, three links are currently deployed but are not being used to provide service, and eight links are disconnected. See File No. 0004587562. For Station WMT635, while 15 links were constructed and/or operated during the license period, two links are currently deployed but are not being used to provide service, and 13 links are disconnected. See File No. 0004589952. For Station WPJA911, two links were constructed and/or operated during the license period, but both links are now disconnected. See File No. 0004591027. For Station WPJC937, 13 links were constructed and/or operated during the license period, one link is currently deployed but is not being used to provide service and 12 links are disconnected. See File No. 0004591084. For Station WJPC939, three links were constructed and/or operated during the license period, two links are currently deployed but are not being used to provide service, and one link is disconnected. See File No. 0004591086.

¹⁷ See Substantial Service Showings at 1.

¹⁸ 47 C.F.R. §§ 1.946(c) (providing that if a licensee in the Wireless Radio Services fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires) and 1.955(a)(2) (cross-referencing Section 1.946(c) and reiterating that authorizations in the Wireless Radio Services automatically terminate without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements).

¹⁹ 47 C.F.R. § 101.17(a).

²⁰ 39 GHz R&O, 12 FCC Rcd at 18624 ¶ 46.

²¹ 47 C.F.R. § 101.17(a).

²² 47 C.F.R. § 101.17(a)(1), (2).

applicable to 39 GHz licenses. Instead, Biztel argues that it meets the Commission's definition of substantial service because it has constructed and operated links for its stations at some time during the license period.²³ Biztel states that "because customers frequently modify their demand for many...services, the links used to provide them . . . also change frequently and often are used for limited periods of time."²⁴

7. We find that Biztel has not demonstrated that the subject stations have met the substantial service standard. We decline to make a finding of substantial service where a licensee is not currently providing service within the licensed area, and conclude that the substantial service requirement presumes some sort of actual service at the substantial service deadline. Here, what Biztel describes as substantial service during the license period does not involve any actual present service by any of the subject licenses, and the safe harbor has not been met. In a case involving the Local Multipoint Distribution Service, another Part 101 service where licensees must demonstrate substantial service at license renewal, the Wireless Telecommunications Bureau ("Bureau") has declined "to make a finding of substantial service where the licensee is not currently providing service within the licensed area."²⁵ No precedent supports Biztel's argument that undertaking past activities at some point during the term of the license, without current service, would constitute substantial service. We therefore conclude that Biztel has not demonstrated substantial service under the Commission's rules.

8. Relying on a Bureau decision accepting other Biztel 39 GHz renewal applications where, during the course of the license terms, microwave paths were established and dismantled,²⁶ Biztel argues that "the fact that the links are disconnected or not currently being used to provide service does not affect AT&T's entitlement to a renewal expectancy" with respect to its licenses.²⁷ Biztel's reliance on this order is misplaced. In 2003, Biztel had constructed at least four links per million population in each licensed area during the license term to provide a variety of services to customers, including wireless local loop service, backhaul, and backbone service for wireless service providers.²⁸ Although Biztel was utilizing these links to provide service to the public, it explained that all the paths were not operational simultaneously for the entire license period because the type of service it provided was dynamic rather than stable.²⁹ As a result, while all of the paths may not have been operational throughout the entire license period, at some point during the license period, there were sufficient paths in operation to meet the safe harbor standard,³⁰ and the stations were constructed and operational at the time of renewal.³¹ In contrast to the *Biztel MO&O*, where Biztel was providing a dynamic current service, Biztel here concedes that the subject stations were either dismantled or not operational when it filed its renewal

²³ Substantial Service Showings at 2.

²⁴ *Id.*

²⁵ See SPEEDUSNY.COM, *Memorandum Opinion and Order and Order on Reconsideration*, 22 FCC Rcd 13974, 13984 ¶ 17 (WTB 2007).

²⁶ Biztel, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 3308 (WTB PS&PWD 2003) (*Biztel MO&O*).

²⁷ See Substantial Service Showings at 2.

²⁸ *Biztel MO&O*, 18 FCC Rcd at 3311 ¶ 7.

²⁹ *Id.*

³⁰ *Id.*

³¹ See File No. 0000309573, Substantial Service Showing Attachment at 1; File No. 0000314076, Substantial Service Showing Attachment at 1.

applications and substantial service showings.³² The Bureau has rejected the proposition that the *Biztel MO&O* supports a finding of substantial service when no service is being provided at the substantial service deadline.³³ Accordingly, we cannot find, based on the record, that Biztel has demonstrated the provision of substantial service for these licenses.

IV. CONCLUSION AND ORDERING CLAUSES

9. Biztel has failed to demonstrate substantial service for the licenses in question. It has not sought an extension of time to meet the substantial service deadline for the subject stations or to justify a waiver of the February 1, 2011 deadline for establishing substantial service. Accordingly, Biztel's licenses to operate Stations WMT620, WMT635, WPJA911, WPJC937, and WPJC939 automatically terminated, by operation of Commission rule, as of February 1, 2011.

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the requests for findings of substantial service made by Biztel, Inc. on January 25, 2011, as amended (File Nos. 0004587562, 0004589952, 0004591027, 0004591084, and 0004591086) ARE DENIED.

11. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the Universal Licensing System SHALL BE UPDATED to reflect that the licenses issued to Biztel, Inc. for Stations WMT620, WMT635, WPJA911, WPJC937, and WPJC939 TERMINATED as of February 1, 2011.

12. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
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³² See n.16, *supra*.

³³ See *SPEEDUSNY.COM*, *supra*, 22 FCC Rcd at 13984-13985 ¶ 17.